SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 145

LOUISE A. WHITCOMB,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

INDEX

	Original	Print
Proceedings before U. S. Board of Tax Appeals	1	1
Docket entries	1	1
Petition (omitted in printing)	2	
Answer (" " ")	5	
Consolidated amended petition (" " ")	6	
Answer to consolidated amended petition (omitted in printing)	13	
Findings of fact and opinion (omitted in printing)	15	
Decision	24	3
Petition for review and assignments of error	25	4
Statement of evidence (omitted in printing)	28	
Præcipe for record (" " ")	64	
Certificate of clerk (" " ")	65	
Orders enlarging time	65	7
Proceedings in Court of Appeals of District of Columbia	67	9
Stipulation as to consolidation, etc	67	9
Argument and submission	68	10
Opinion, Martin, J., cause No. 5665	69	11
Judgment, cause No. 5665	69	11
Designation of record	70	12
Clerk's certificate	71	13
Stipulation as to consolidation, etc	71	14
Opinion, Martin, J., cause No. 5664	73	15
Dissenting opinion, Groner, J., cause No. 5664	83	25
Judgment, cause No. 5664	85	27
Order allowing certiorari	87	27
Stipulation as to records, etc	88	28

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 16, 1933

[fols. a-1] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 16118

LOUIS A. WHITCOMB, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

For taxpayer: Alfred Sutro, Esq., F. T. Smith, Esq., V. K. Butler, Esq., Robert Littleton, Esq.
For commissioner: John D. Foley, Esq.

DOCKET ENTRIES

1926.
May 19. Petition received and filed.
" 21. Copy of petition served on solicitor.
" 21. Notification of receipt mailed taxpayer.
July 16. Answer filed by solicitor.
Aug. 25. Copy of answer served on taxpayer. General Calendar.
1928.
June 30. Hearing date set 10-23-28.
Oct. 17. Motion for transfer to Reserve Cal. filed by taxpayer. See 16117.
" 18. Motion granted.
1929.
Mar. 11. Hearing set Apr. 12, 1929.
Apr. 5. Motion to place on Reserve Cal. filed by G. C. See 16121. 4-8-29. Granted.
Apr. 8. Motion to place on Reserve Cal. filed by taxpayer. No action necessary.
Nov. 19. Hearing set Jan. 24, 1930.
" 26. Motion to place on Cir. Cal. for hearing in San Francisco filed by taxpayer. See 16117.
" 29. Motion granted.
1930.
Mar. 11. Hearing set May 19, 1930, San Francisco, Calif.
Apr. 19. Motion to consolidate with dkts. 16117 to 16122, 27940 to 27944, and 46510 to 46513, and to amend petition, amendment tendered, filed by taxpayer 4-19-30. Granted.
" 24. Copy of amended petition served on G. C.

May 19. Hearing had before Mr. Marquette on merits and motion to consolidate for hearing and decision with dkts. 46510-11-12-13-27940-41-42-43-44-16117-18-19-20-21-22. Amended answer to be filed by respondent (dictated into record). Briefs due Sept. 1, 1930.

Aug. 16. Stipulation for extension to 10-1-30 to file briefs filed. 8-22-30. Granted.

" 19. Transcript of hearing of May 19, 1930, filed.

Sept. 25. Motion for extension to Oct. 15, 1930, to file brief filed by taxpayer. 9-29-30. Granted. See 16117.

" 29. Brief filed by G. C.

[fols. 2–23]

Oct. 8. Motion for extension to Nov. 1, 1930, to file brief filed by taxpayer. 10-9-30. Granted.

" 31. Brief filed by taxpayer.

1931.

Feb. 11. Findings of fact and opinion rendered, John J. Marquette, Div. 1. Judgment will be entered under Rule 50.

May 20. Notice of settlement filed by G. C.

May 25. Hearing set June 24, 1931, on settlement.

June 13. Consent to settlement filed by taxpayer.

" 25. Decision entered, John J. Marquette, Div. 1.

Dec. 22. Petition for review to Ct. of Ap. of D. C. with assignments of error filed by G. C.

" 22. Proof of service filed.

1932.

Feb. 10. Motion for extension to April 20, 1932, to complete and transmit record filed by G. C.

" 12. Order enlarging time to April 20, 1932, for preparation of evidence and delivery of record entered.

Mar. 17. Statement of evidence lodged.

" 19. Notice of lodgment of statement and of hearing Mar. 30, 1932, filed.

" 30. Hearing had before Miss Mathews on approval of statement of evidence. On motion of counsel for the petitioner to continue and no objection by the respondent, continued to April 13, 1932.

" 30. Order of continuance to April 13, 1932, for hearing on approval of statement of evidence entered.

Apr. 12. Statement of evidence approved and ordered filed.
" 14. Præcipe with proof of service thereon filed.
" 18. Order entered extending time for transmission of record to May 20, 1932.

[fol. 24] BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 16118

LOUIS A. WHITCOMB, by JOHN FREULER, Agent, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to findings of fact and opinion promulgated February 11, 1931, the respondent herein, to-wit, on May 20, 1931, having filed a proposed redetermination for the year 1921, and the petitioner on June 13, 1931, having filed notice of acquiescence to the said proposed redetermination, it is

[fol. 25] Ordered and decided that there is a deficiency for the year 1921 in the amount of $31.89.

(Signed) John J. Marquette, Member.

Entered June 25, 1931.

A true copy. Teste:
B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Docket No. 16118

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

v.

LOUIS A. WHITCOMB, Respondent

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR—Filed Dec. 22, 1931

To the Honorable Judges of the Court of Appeals of the District of Columbia:

Now comes David Burnet, Commissioner of Internal Revenue, by his attorneys, G. A. Youngquist, Assistant Attorney General, C. M. Charest, general counsel, Bureau of Internal Revenue, and John D. Foley, special attorney, Bureau of Internal Revenue, and respectfully shows:

I

The petitioner for review (hereinafter referred to as the commissioner) is the duly appointed and qualified Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The respondent (hereinafter referred to as the taxpayer) is an individual citizen and resident of the French Republic and is not an inhabitant of any judicial circuit of the United States.

II

The commissioner determined a deficiency in income tax for the calendar year 1921 in the amount of $524.78, and on March 23, 1926, in accordance with the provisions of subdivision (a) of section 283 of the revenue act of 1926, sent to the taxpayer by registered mail a notice of said deficiency. Thereafter the taxpayer duly appealed said notice of deficiency to the United States Board of Tax Appeals. Said appeal was heard by said board on May 19, 1930. On February 11, 1931, said board promulgated its interlocutory decision containing its findings of fact and opinion, and on June 25, 1931, entered its order of redetermination wherein

[fol. 26] it ordered and decided that there was a deficiency in income tax for the calendar year 1921 in the amount of $31.89.

During the calendar year 1921 the taxpayer was one of the beneficiaries of a trust established under the will of one A. C. Whitcomb, deceased. By the terms of said decedent's will the income of the trust was required to be distributed among the beneficiaries thereof. During the calendar year 1921 the trust property sustained depreciation in the amount of $43,003.16. In distributing the income of the trust among the beneficiaries, the trustee did not take into account the depreciation sustained by the property of the trust, but distributed to each beneficiary his or her proportionate part of the income of the trust without regard to any depreciation. The decedent's will was silent upon the question whether depreciation was to be taken into account in determining the income of the trust available for distribution among the beneficiaries. On September 5, 1928, the trustee filed his account covering the period from February 23, 1913, to February 23, 1928, with the superior court for the city and county of San Francisco, California, together with a petition that the account be approved. The account was objected to by two of the remaindermen of the trust. On September 19, 1928, the court entered a decree whereby it found that the trustee's action in not reserving necessary amounts for depreciation before distributing the income of the trust among the beneficiaries was improper and whereby it directed that the recipients of the income of the trust for the period from February 23, 1913, to February 23, 1927, pay back to the trustee the excess amounts received by them. On January 17, 1929, the taxpayer executed and delivered to the trustee her promissory note for the amount by which the distributions made to her from February 23, 1913, to February 23, 1927, exceeded the distributions which would have been made had the trustee retained a reserve for depreciation of the trust property. The note bears no interest and by its terms is payable at the termination of the trust. In her income-tax return for the calendar year 1921 the taxpayer reduced her taxable income by the proportion which the depreciation sustained by the trust bore to the net income of the trust before the deduction for depreciation. The commissioner increased her taxable income by this amount, but the Board refused to allow such increase to be made.

III

The commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and order of redetermination promulgated and entered by the Board of Tax Appeals manifest error occurred and intervened to the prejudice of the commissioner, and the commissioner assigns the following errors, and each of them, which, he avers, occurred in the said record, proceedings, decision and order of redetermination and upon which he relies to reverse the said decision and order of redetermination so promulgated and entered by the Board of Tax Appeals, to wit:

[fols. 27-64] 1. The board erred in holding that the distributions made by the trustee to the taxpayer were not income to thetaxpayer in their entirety.

2. The board erred in holding that it made no difference that the so-called excessive distributions to the taxpayer were never paid back.

3. The board erred in holding that the distributions of the income of the trust received by the taxpayer without diminution on account of depreciation sustained by the trust property were not taxable income in their entirety to the taxpayer.

4. The board erred in holding that the giving of a non-interest bearing promissory note not payable until the death of a person in being was equivalent to the repayment by the taxpayer of any income received by the taxpayer in the taxable year.

5. The board erred in holding that the decree of a court passed in a subsequent year in a freindly suit to which the Government was not a party could affect the Government's right to income taxes in the year in which the income was received.

6. The board erred in not approving the deficiency proposed for assessment by the commissioner.

Wherefore, the commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the Court of Appeals of the District of Columbia, that a transcript of the record be prepared in accordance with law and with the

rules of said court and transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

G. A. Youngquist, Assistant Attorney General.
C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: John D. Foley, Special Attorney, Bureau of Internal Revenue.

Duly sworn to by C. M. Charest. Jurat omitted in printing.

[fol. 65] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 16118

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

LOUIS A. WHITCOMB, Respondent

ORDER ENLARGING TIME

Upon motion of counsel for the petitioner, it is

Ordered: That the time for preparation of evidence and for transmission and delivery of the record sur petition for [fol. 66] review of the above entitled proceeding in the Court of Appeals for the District of Columbia, be and it is hereby extended to April 20, 1932.

(Signed) Logan Morris, Member.

Dated Washington, D. C., February 12, 1932.

True copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 16118

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

LOUIS A. WHITCOMB, Respondent

ORDER ENLARGING TIME

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above-entitled

proceeding in the Court of Appeals for the District of Columbia, be and it is hereby extended to May 20, 1932.

(Signed) Logan Morris, Member.

Dated Washington, D. C., April 18, 1932.

A true copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

(Seal.)

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA,
APRIL TERM, 1932

No. 5664

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

v.

MARGUERITE T. WHITCOMB, Respondent

No. 5665

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

v.

LOUISE A. WHITCOMB, Respondent

No. 5667

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

v.

CHARLOTTE A. W. LEPIC, Respondent

STIPULATION

It is hereby stipulated as follows:

The decision in Number 5664 shall control the decision in the following Numbers: 5667, 5669, 5671, 5672, 5674. If judgment shall be rendered for the respondent in Number 5664, the decision of the Board of Tax Appeals shall be affirmed in each of the cases mentioned in this paragraph. If judgment shall be rendered for the petitioner in Number 5664, judgment shall also be rendered for the petitioner in the above cases for the respective amounts therein involved.

The decision in Number 5665 shall control the decision in the following Numbers: 5666, 5668, 5670, 5673, 5675. If judgment shall be rendered for the respondent in Number 5665, the decision of the Board of Tax Appeals shall be affirmed in each of the cases mentioned in this paragraph. If judgment shall be rendered for the petitioner in Number

5665, judgment shall also be rendered for the petitioner in each of the other cases mentioned in this paragraph for the respective amounts therein involved.

No. 5665 shall be heard with No. 5664, but the parties may present separate briefs in that case, and nothing contained in any previous stipulation shall be construed as requiring the decision in No. 5665 to be controlled by the decision in No. 5664.

G. A. Youngquist, Attorney for Petitioner. (Signed) W. W. Spalding, Attorney for Respondents.

Dated Feby. 25, 1933.

[Endorsed:] Nos. 5664, 5665, 5667. Burnet v. Whitcomb et al. Stipulation. Court of Appeals, District of Columbia. Filed Feb. 27, 1933. Henry W. Hodges, Clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA,

Monday, March 13th, A. D. 1933.

* * * * * * *

No. 5664

DAVID BURNET, Commissioner of Internal Revenue, Appellant,

vs.

MARGUERITE T. WHITCOMB, by JOHN FREULER, Agent,

and No. 5665

DAVID BURNET, Commissioner of Internal Revenue, Appellant,

vs.

LOUIS A. WHITCOMB

The argument in the above entitled causes was commenced by Mr. William Cutler Thompson, attorney for the appellant, and was continued by Mr. Claude R. Branch, attorney for the appellees, and was concluded by Mr. William Cutler Thompson, attorney for the appellant.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5665

DAVID BURNET, Commissioner of Internal Revenue,
Appellant,

v.

LOUIS A. WHITCOMB

Appeal from the Board of Tax Appeals

(Argued March 13, 1933. Decided May 22, 1933)

G. A. Youngquist, Sewall Key, C. M. Charest, and John D. Foley, all of Washington, D. C., for appellant.

Claude R. Branch, of Boston, Mass., and W. W. Spaulding, of Washington, D. C. for appellee.

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices

MARTIN, Chief Justice:

The issues in this appeal are controlled by the same principles as those in case No. 5664 which is concurrently decided by us.

The decision of the Board of Tax Appeals is accordingly reversed and the cause is remanded for further proceedings not inconsistent herewith.

Mr. Justice Groner dissents.

A true copy. Teste:

——, Clerk Court of Appeals, D. C.

Monday, May 22nd, A. D. 1933.

* * * * * * *

No. 5665, April Term, 1933

DAVID BURNET, Commissioner of Internal Revenue,
Appellant,

vs.

LOUIS A. WHITCOMB

Appeal from the Board of Tax Appeals

This cause came on to be heard on the transcript of the record from the Board of Tax Appeals and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby, reversed, and that this cause be and the same is hereby remanded to the said Board of Tax Appeals for further proceedings not inconsistent with the opinion of this Court.

Per Mr. Chief Justice Martin, May 22, 1933.

Mr. Justice Groner dissenting.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA,
APRIL TERM, 1932

No. 5665

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

vs.

LOUISE A. WHITCOMB, Respondent

DESIGNATION OF RECORD

To the Clerk of the Court of Appeals of the District of Columbia:

Will you please make up, for use in application for writ of certiorari, a certified record in the above entitled proceeding, including therein the following:

1. Printed record.
2. Stipulation filed February 27, 1933, that Docket Nos. 5666, 5668, 5670, 5673 and 5675 abide the decision in 5665.
3. Argument.
4. Opinion and dissenting opinion.
5. Judgment.
6. This designation.
7. Certificate.

(Signed) W. W. Spalding, Attorney for Respondent.

[Endorsed:] No. 5665. David Burnet, Commissioner of Internal Revenue, vs. Louise A. Whitcomb, Respondent. Filed June 8, 1933. Designation of record on petition for certiorari to S. C. U. S. W. W. Spalding, Atty. for Respondent. Court of Appeals, District of Columbia. Filed Jun. 8, 1933. Henry W. Hodges, Clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 74, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals as designated by counsel in the case of David Burnet, Commissioner of Internal Revenue, Appellant, vs. Louis A. Whitcomb, No. 5665, April Term, 1933, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 8th day of June, A. D. 1933.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal Court of Appeals, District of Columbia.)

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1932

No. —

(D. C. A. 5665)

LOUISE A. WHITCOMB, Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue, Respondent

(D. C. A. 5666)

LYDIA L. WHITCOMB, Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue, Respondent

(D. C. A. 5668)

LOUISE A. F. E. WHITCOMB, Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue, Respondent

(D. C. A. 5670)

LYDIA L. I. WHITCOMB, Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue, Respondent

(D. C. A. 5673)

LYDIA LOUISE IDA WHITCOMB, Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue, Respondent

(D. C. A. 5675)

LOUISE A. F. E. WHITCOMB, Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue, Respondent

STIPULATION

It is hereby stipulated as follows:

In the Courts below the above entitled proceedings were consolidated and heard as one cause upon one record; and in the Courts below it was agreed that the decision in cause No. 5665 below should control the decision in the following numbered causes: 5666, 5668, 5670, 5673 and 5675 below.

It is now agreed between the parties, that in order to save costs and avoid duplication, the application for writs of certiorari may be made in consolidated form upon one supporting record and brief; and that the judgment of the Court in cause No. 5665 below, under the docket number assigned to it herein, may be treated as the judgment of the Court in numbers 5666, 5668, 5670, 5673 and 5675, below, under the docket numbers assigned to them herein.

Dated at Washington, D. C., this the 6th day of June, 1933.

W. W. Spalding, Attorney for Petitioners. J. Crawford Biggs, Sol. Gen'l, Attorney for Respondent.

[fol. 73] IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5664

DAVID BURNET, Commissioner of Internal Revenue, Appellant,

v.

MARGUERITE T. WHITCOMB, by JOHN FREULER, Agent, Appellee

Appeal from the Board of Tax Appeals

(Argued March 13, 1933. Decided May 22, 1933)

G. A. Youngquist, Sewall Key, Wm. Cutler Thompson, C. M. Charest, Dewitt M. Evans, and John D. Foley, all of Washington, D. C., for appellant.

Claude R. Branch, of Boston, Mass., and W. W. Spaulding, of Washington, D. C., for appellee.

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices

OPINION

MARTIN, Chief Justice:

This appeal involves income taxes for the year 1921, and is prosecuted by the Commissioner of Internal Revenue from an order of redetermination of the Board of Tax Appeals.

The controversy relates to the estate of A. C. Whitcomb, deceased, a resident of the State of California, who died in the year 1889, leaving a last will which was admitted to probate by the Superior Court of San Francisco. The decedent left surviving him his widow, Louise P. V. Whitcomb, a daughter, Charlotte A. W. Lepic, and a son, Adolph Whitcomb. The latter died on September 5, 1914, survived by his widow, Marguerite T. Whitcomb, the respondent [fol. 74] herein, and his children, Louise A. Whitcomb and Lydia L. Whitcomb.

Item seventh of decedent's will reads as follows:

"7th. I give to my hereinafter named executor, Jerome Lincoln, of said San Francisco, all the rest of my property, real, personal, or mixed, except what I may have in France, of every kind and nature and not hereinbefore disposed of, after the payment of my debts, in trust, nevertheless, to pay over to my said wife, Louise Palmyre Bion Whitcomb, one-third part of the interest thereon or income therefrom for and during her natural life, and the other two-thirds parts to my two children, born of her: One, Adolph, born on or about the 23rd day of February, 1880, and the other, Charlotte Andree, born on or about the 4th day of December, 1882, with the reversion or remainder of the whole three-thirds parts to the descendants 'per stirpes' of the said two children, if any be alive at the time of the death of the said two children; and if none be alive at that time, to Harvard College, in conformity with the provisions named or indicated in section six (6) of this will, having reference to said Harvard College."

The will contains no directions as to the manner in which the income from the trust shall be computed, and makes no provision relating to depletion nor a depletion reserve fund.

Since the year 1905 James Otis has served as trustee of the trust thus created. The original trust estate consisted largely of cash, bonds, stocks, and notes. On February 23, 1906, the trust estate consisted of similar securities of a total value of more than $3,000,000, together with certain parcels of real estate, most of which were in San Francisco. On April 18, 1906, the San Francisco earthquake and fire occurred. All of the improvements on the San Francisco real estate owned by the trust were destroyed by the fire. Some time after this the trustee adopted the policy of improving the real estate owned by the trust and of converting the other assets of the estate to accomplish that purpose. As a result of this policy and of the acquisition of additional parcels of real estate, the assets of the trust for several years prior to 1921, and during the years 1921 to 1926, inclusive, consisted almost entirely of improved [fol. 75] real estate, including the Whitcomb Hotel and its furniture and equipment. The latter item represented an investment of more than $2,000,000.

During the years 1921 to 1926, inclusive, the trust estate suffered exhaustion, wear, and tear, as follows:

1921	$43,003.16	1924	$39,258.00
1922	39,408.00	1925	39,108.00
1923	39,408.00	1926	55,833.00

The trustee of the trust filed fiduciary income-tax returns for the years 1921 to 1926, inclusive, and deducted in computing the net income of the trust for each year the respective amounts above set forth, representing exhaustion, wear, and tear sustained by the trust. The trustee, however, did not withhold these amounts or any part of the income of the trust estate from the beneficiaries to whom income payments were due, and each of them received his undiminished share of the income of the trust. From 1903 to 1928 the trustee presented an annual account of his proceedings to the beneficiaries, but did not file any account in the Superior Court of San Francisco, which had jurisdiction over the trust. However, on September 5, 1928, the trustee filed with the court an account covering the period from February 23, 1903, to February 23, 1928, and setting out all of the payments made to the beneficiaries during that period. This was accompanied by a petition for its allowance.

The allowance of the account was opposed by Napoleon Charles Louis Lepic and Charlotte de Rouchechouart, children of Charlotte A. W. Lepic, one of the beneficiaries herein, who are two of the remaindermen entitled to part of the corpus of the trust upon the termination thereof, if they be then living. In their objections, which were filed with the court, they alleged that the trust property had sustained depreciation during the years 1913 to 1927, inclusive, in the amount of $622,434.11; that no reserve or other provision for such depreciation had been made from the gross income of the trust estate; that such amount of $622,434.11 had been paid by the trustee to the beneficiaries as income of the trust, thus impairing the trust property to that extent, and they prayed that the trustee be charged therewith. All of the parties interested in the trust estate were notified of the filing of the account and of the objec- [fol. 76] tions, and were represented by counsel at the hearing held thereon.

On September 19, 1928, the court entered an order in the matter which is in part as follows:

"It is hereby ordered, adjudged, and decreed that the objection of said Napoleon Charles Louis Lepic and Charlotte de Rochechouart to said account that no reserve or other provisions for annual depreciation for the years 1913 to 1927, both inclusive, as set forth in said objections, has been made, be, and the same is hereby, sustained; that the amount specified in said objections for each of said respective years from 1913 to 1927 is a proper amount to be allowed for depreciation, said amount for each of said respective years being as follows, to wit:

1913	$23,751.00
1914	23,070.00
1915	23,748.00
1916	31,248.00
1917	41,222.83
1918	55,302.96
1919	56,273.93
1920	55,585.23
1921	43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00
1927	56,214.00

"that James Otis, the said trustee, made the disbursements as stated in his said fourteenth account without deduction of reserves or other provision for depreciation, under and pursuant to the advice of counsel learned in the law and retained by said trustee, to the effect that under and by virtue of the terms of said trust it was the duty of said trustee to make such disbursements with such deduction; that said trustee in making said disbursements without such deduction was entitled to rely upon said advice of the said counsel, and that said disbursements were so made by said trustee in good faith and without objection on the part of either the said Napoleon Charles Louis Lepic and/or the [fol. 77] said Charlotte de Rouchechouart, or any other person interested in said trust, and that no personal liability

of any kind or nature should or does attach to said trustee or to said James Otis by reason of having made such disbursements or any of them without deductions.

"It is further ordered, adjudged, and decreed that the recipients of the income of said trust estate during the period from February 23, 1913, to February 23, 1927, repay to the said trustee the respective amounts received by them during the years 1913 to 1927, both inclusive, as set forth in said objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart as the respective amount which should have been retained by said trustee as a reserve for depreciation for each of said years 1913 to 1927, both inclusive.

"It is further ordered, adjudged, and decreed that from and after the year ending February 23, 1927, and until the termination of said trust, the said trustee withhold annually as a reserve for depreciation from the income from the trust property such an amount as may be proper according to the rules and regulations prescribed by the Government of the United States in connection with income-tax returns, and if there be no such rules or regulations then such an amount as may be reasonable and proper.".

Thereupon, on January 17, 1929, Louise A. Whitcomb, Marguerite T. Whitcomb, Lydia L. Whitcomb, Charlotte A. W. Lepic, Napoleon Charles Louis Lepic, and Charlotte de Rochechouart, acting in conformity with the court's order, executed and delivered to the trustee their promissory notes for the amounts by which the distributions made to them exceeded the distribution which would have been made had the trustee retained a reserve for depreciation of the trust property. The notes were to bear no interest and were made payable at the termination of the trust—that is, upon the death of Charlotte A. W. Lepic.

The respondent in her return of income for the year 1921 did not include the full amount paid to her by the trustee, but omitted therefrom her proportionate share of the depreciation deducted on the fiduciary return of the estate. The Commissioner increased the income shown on the return by such proportionate share of the depreciation and [fol. 78] determined a deficiency in tax accordingly. The Board of Tax Appeals, six members dissenting, reversed and set aside the determination of the Commissioner, who then appealed for a review by this court.

The question at issue is whether respondent, as life beneficiary under the testamentary trust aforesaid, is entitled to a deduction for depreciation of the corpus of the trust, notwithstanding that she received from the trustee her full share of the accruing income of the trust undiminished because of depreciation or otherwise. The statute involved reads as follows:

"Revenue Act of 1921, c. 136, 42 Stat. 227

"Sec. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including——

* * * * * * *

"(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

* * * * * * *

"(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his [fol. 79] proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust."

The present issue may be considered first as the case stands without regard to the decision of the California

court. The authorities up to that time were unanimous in support of the proposition that a life beneficiary of a trust estate is taxable upon the full amount of income actually received by or distributable to him during the taxable year, without deduction for depreciation sustained by the corpus of the trust.

In Baltzell v. Mitchell, 3 F. (2d) 428 (C. C. A. 1st), certiorari denied, 268 U. S. 690, it was held that under the Revenue Act of 1918, sec. 219, subd. (d), the life beneficiary of the income of a trust estate is taxable on the income actually received by or distributable to him, without deduction for losses to the capital of the estate incurred during the year. In Abell v. Tait, 30 F. (2d) 54 (C. C. A. 4th), a case presenting similar facts, a similar decision was reached.

In the case of Whitcomb v. Blair, 25 F. (2d) 528, involving the same beneficiary, the same trust, and the same question as is presented in the present case, although for a prior taxable year, we held against the claim of the life beneficiary in the following terms:

"The appellant as life tenant in the trust estate was entitled to receive the full one ninth of the income therefrom, without regard to exhaustion or wear and tear of the corpus of the estate, and this is what appellant actually received from the trustee as her distributive share of the income. The trustee was not entitled to withhold any part of her share of the income of the trust estate in order to make good the exhaustion or wear and tear of the capital assets of the estate; nor did the trustee in fact do so. Capital losses in such cases fall upon the reversioners or remaindermen and not upon the life tenant. Therefore, the payment made by the trustee to appellant was in fact and law the distributive share of the income to which she was entitled as life tenant and consisted in no part of capital depreciation restored to her. It was therefore taxable in her hands. This conclusion is not negatived by the fact that the trustee was entitled to enter deductions for capi- [fol. 80] tal losses or gains in his return for the trust estate as a single entity."

In Kaufman v. Commissioner, 44 F. (2d) 144 (C. C. A. 3rd), the foregoing decision was cited with approval and the court declined to sanction a deduction to a life tenant

for depreciation of buildings, part of the corpus of the trust. In Hubbell v. Burnet, 46 F. (2d) 446 (C. C. A. 8th), certiorari denied, 283 U. S. 840, the decision in Whitcomb v. Blair, supra, was cited with approval and the court held that although certain amounts of depreciation were actually set aside by the trustee, their retention was unauthorized and that they were "distributable" and accordingly were subject to tax. In Codman v. Miles, 28 F. (2d) 823 (C. C. A. 4th), certiorari denied, 278 U. S. 654, the court declined to allow a deduction from the amount actually distributed to a life beneficiary on account of the exhaustion of the corpus, pointing out that such a course of action "would invite as well as permit, to an unlimited extent, subterfuges whereby those entitled to large incomes could avoid their just obligations to the Government." In Codman v. Commissioner, 50 F. (2d) 763 (C. C. A. 1st), involving the same trust as in Codman v. Miles, supra, a similar conclusion was reached. In Roxburghe v. Burnet, 61 App. D. C. —, 58 F. (2d) 693, certiorari denied, 286 U. S. 567, and in Mary Roxburghe v. United States, 64 Ct. Cls. 598, both cases relating to the same taxpayer but to different tax years, the taxpayer claimed a deduction of three per cent from income actually received by her from the trustee on account of depreciation of houses composing the trust property, and the claim was denied in both cases.

The question next arises whether the decision of the California court has made this case an exception to that rule. We think it has not. That decision does not rest upon an interpretation of any statute of California, nor can it be said to rest upon an interpretation of the testator's will.

In American Security and Trust Company v. Paine, 33 App. D. C. 178, we held that in construing a will for the purpose of determining whether it is the duty of the trustee thereunder to pay the entire income derived from a trust fund to the life tenant, or to make certain deductions therefrom for the benefit of the remainderman, the question involved is not to be determined by any arbitrary rule, but [fol. 81] by ascertaining, if possible, the meaning and intention of the testator from the language employed in the creation of the trust, from the relation of the parties to each other, their condition, and the surrounding facts and circumstances of the case.

It is fair to assume in this case that had the testator intended that the trustee should establish such a reserve

fund for depreciation, there would have been apt and effective language in the will to declare that purpose. By the terms of the will the testator undertook to provide for his widow and his two children primarily. They were the principal and immediate objects of his bounty, and it is unreasonable to believe that he intended that the annual payments of income to them should be made dependent upon the vicissitudes attending the corpus of the fund. At the time of the execution of the will the testator's assets consisted almost entirely of notes, bonds, and other like property. It was not until many years after the death of the testator that the assets were in large part converted into improved real estate and the subject of depreciation became one of present importance.

The trustee continued the control of the trust from 1903 to 1928, making annual accounts with the life beneficiaries of the trust, and it appears that during those years no action was taken to establish a reserve for depreciation; nor did the trustee during all of that period file any account of his proceedings with the probate court having jurisdiction over the trust estate. In the year 1928 for the first time, following shortly after the decision of this court in the case of Whitcomb v. Blair, supra, the trustee filed an account in the probate court and the court ordered the trustee to establish a reserve fund for depreciation and determined the amount thereof for the years 1913 to 1927. The life beneficiaries were ordered to refund that amount to the trustee. They did this by executing promissory notes bearing no interest, and payable at the termination of the trust.

It is claimed in effect that this record conclusively establishes the right of the life beneficiaries to deduct from their income-tax returns for the years 1921 to 1926, inclusive, the amounts found to be due in those years to the trustee for the reserve fund for depreciation.

[fol. 82] We are of the opinion, however, that the order of the probate court made in the settlement of the trustee's account is not sufficient authority to overcome the general rule theretofore established under the Federal income-tax law. There are many decisions showing the mutual respect exhibited by the Federal and State courts in dealing with one another's decisions. It seems needless in this case to

enter into a discussion of them, for in our opinion the bare statement of the facts in this case shows that we may without disrespect to the California probate court follow the ruling which this court, respecting this identical trust, reported prior to the decision of that court, and which has since been approved and adopted by the other Federal courts above named.

In Ford v. Commissioner, 51 F. (2d) 206 (C. C. A. 6th), certiorari denied, 284 U. S. 666, it appeared that the executors of an estate which consisted mostly of stocks made a partial distribution in 1920 of the stocks and the legatees received the dividends therefrom in 1922. The probate court in 1926 held the distribution to be premature and ordered the legatees to account for the principal and income of the stocks from the date of distribution up to December 31, 1922. The matter was handled entirely by book entries. The court in passing upon the matter said, in part:

"We think these 1922 dividends were taxable income received by the petitioners during that year. Certainly they then had complete legal title to the stock and to the dividends. If taxes regularly assessed could be invalidated, an indefinite number of years later, by a consent judgment purporting to vacate the title of the taxpayer to the fund he had reported as income, the necessary system of tax collection would be much impaired. The true normal criterion to be applied in this class of case is the actual receipt and retention during the year in question of what was then considered to be income, not whether the taxpayer exposed himself to possible personal liability."

In Fidelity and Columbia Trust Company v. Lucas, 52 F. (2d) 298, the court said:

"Furthermore, it is well settled that a decision of a State court, establishing a local rule of property or construing [fol. 83] a State statute or a contract made after the rights of a litigant in a Federal court suit had accrued, and in a case to which he was not a party, is not binding upon the Federal court."

See also Kuhn v. Fairmont Coal Company, 215 U. S. 349.

Our conclusion herein follows the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Com-

missioner v. Freuler, decided January 9, 1933, which related to the identical issue now before us. In respect to the decision of the California court, it says:

"The respondent urges that as the orders of the probate court requiring the amounts of the depreciation reserve so paid to respondent's decedent be repaid to the trust estate, they are binding upon the Federal courts in determining what are proper deductions to be made under the income law. In this connection we must not forget that we are now considering the application of a Federal income taxing statute to the objections and rights of parties in a testamentary trust of real property and not the question of the construction of a State statute or rule of property rights by the highest court of the State. We have here the consideration of orders of the probate court made after hearing objections of the remaindermen to the trustee's account. The account covered the period from 1903 to 1928 and was filed on September 5, 1928. These orders were made on September 19, 1928, some six years after the taxable year 1921. * * * However, no orders of the probate court, the effect of which would relate to what are deductions to be allowed under the national income taxing law, are conclusive and binding on the Federal courts when in considering a revenue act, and the duty of such courts is to exercise its own independent judgment."

In our opinion, therefore, the decision of the Board of Tax Appeals was erroneous; it is reversed and the cause is remanded for further proceedings not inconsistent herewith.

DISSENTING OPINION

GRONER, J., dissenting:

I am unable to agree, and I shall state the reasons of my dissent briefly.

[fol. 84] The question at issue is controlled by the provisions of section 219 of the Revenue Act of 1921. Subdivision (d) of that section imposes a tax on the net income of each beneficiary of an estate or trust received in the taxable year "which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not * * *."

Fairly construed, I think it cannot be doubted that the true test of liability depends upon whether the income is

distributable. If it is, it is taxable whether received or not. If it is not, it would seem to me to follow that it is nontaxable, even though received, as, for instance, by mistake. If I have correctly stated the rule, then it follows that in this case the decision would turn on the question whether the income sought to be taxed was properly distributable to the taxpayer.

In Whitcomb v. Blair, referred to in the opinion of the court, there was agreement between both parties that the taxpayer was entitled to the sums received and taxed, and on that basis we held the taxpayer was "in fact and in law" entitled to receive the income which was taxed. After our decision, two of the remaindermen filed timely objections to the trustee's account. The Superior Court of California having jurisdiction of the trust, all parties in interest being then before the court, entered a decree charging the beneficaries, including taxpayer, in the amount of $622,000 on the ground that that amount, representing depreciation for the years 1913 to 1927, had been unlawfully paid to them by the trustee, and also directing the trustee to withhold annually thereafter for depreciation a reasonable and proper amount from the income of the trust property. One of the beneficiaries paid in cash his share of the amount required to be returned to the trustee, but the others, including taxpayer, gave the trustee their notes bearing interest and payable at the termination of the trust. The acceptance of the notes was apparently with the consent of the remaindermen.

The case, therefore, is one in which a State court having jurisdiction of the estate and of the parties has decreed that the taxpayer was not entitled to certain portions of the income received by her over a period of years, including the year involved here, and that the sum so improperly received should be returned to the trustee, and the court's [fols. 85 & 86] order has been obeyed. If, therefore, the statute taxes only the income properly received, and if the final decree of the State court is in accordance with the California law, as I think it is, and is therefore conclusive and binding, as it seems to me it is (Keith v. Johnson, 271 U. S. 1-8), it would follow necessarily that the final decree of that court forecloses the question.

In this aspect there remains only the question whether the decree of the State court was obtained in a collusive

suit. There is nothing in the record to sustain a contention of that sort.

I think, therefore, the decision of the Board of Tax Appeals should be affirmed.

A true copy. Teste:

——— ———, Clerk Court of Appeals, D. C.

———

IN COURT OF APPEALS OF DISTRICT OF COLUMBIA, APRIL TERM, 1933

* * * * * * *

No. 5664

DAVID BURNET, Commissioner of Internal Revenue, Appellant,

vs.

MARGUERITE T. WHITCOMB, by JOHN FREULER, Agent

Appeal from the Board of Tax Appeals

JUDGMENT—May 22, 1933

This cause came on to be heard on the transcript of the record from the Board of Tax Appeals and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded to the said Board of Tax Appeals for further proceedings not inconsistent with the opinion of this court.

Per Mr. Chief Justice Martin, May 22, 1933.

Mr. Justice Groner dissenting.

[fol. 87] SUPREME COURT OF THE UNITED STATES

No. 145

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 88] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1933

No. 129, No. 130, No. 131, No. 139, No. 140, No. 141, No. 142, [fol. 89] No. 143, No. 144, No. 145, No. 146, No. 147, No. 148, No. 149, No. 150

STIPULATION AS TO RECORDS, ETC.—Filed Nov. 15, 1933

Subject to the approval of the Court, it is hereby stipulated between counsel in the above cases as follows:

1. Only cases numbered 129 and 145 are to be argued. These are to be argued as two separate cases.

[fol. 90] 2. The decision in No. 129 shall control the decision in Nos. 130 and 131 (Nos. 6833 and 6834 in the Circuit Court of Appeals for the Ninth Circuit) and Nos. 139-144, inclusive (Nos. 5664, 5667, 5669, 5671, 5672 and 5674 in the Court of Appeals of the District of Columbia). If judgment shall be rendered for the petitioner in No. 129, the judgments of the courts below shall be reversed in each of the cases mentioned in this paragraph. If judgment shall be rendered for the respondent in No. 129, the judgments of the courts below shall be affirmed in each of the cases mentioned in this paragraph.

3. The decision in No. 145 shall control the decision in Nos. 146-150, inclusive (Nos. 5666, 5668, 5670, 5673 and 5675 in the Court of Appeals of the District of Columbia). If judgment shall be rendered for the petitioner in No. 145, the judgments of the Court of Appeals of the District of Columbia shall be reversed in each of the cases mentioned in this paragraph. If judgment shall be rendered for the respondent in No. 145, the judgments of the Court of Appeals of the District of Columbia shall be affirmed in each of the cases mentioned in this paragraph.

4. In preparing the record to be used in this Court in connection with the argument in No. 129, the Clerk shall include the following matters:

The record as filed with the petition for certiorari.

The opinion of the Court of Appeals of the District of Columbia in No. 139 (No. 5664 in the Court of Appeals of the District of Columbia).

[fol. 91] The stipulation presented in connection with the petition for certiorari.

The order granting certiorari.

This stipulation.

5. In preparing the record to be used in this Court in connection with the argument in No. 145, the Clerk shall include only the following matters:

Docket entires, pp. 1-2.

Decision of the Board of Tax Appeals, pp.-24-25.

Petition for review filed in the Court of Appeals of the District of Columbia, pp. 25-27.

Orders enlarging time, pp. 65-66.

Opinions and judgments of the Court of Appeals of the District of Columbia in Nos. 139 and 145 (Nos. 5664 and 5665 in the Court of Appeals).

The order granting certiorari.

This stipulation.

The Clerk shall also include references only to the various proceedings which appear on pp. 2-24 and 28-64 in the record in No. 129.

6. This stipulation is entered into solely for the purpose of reducing the amount of printing required for the record in these cases. The parties stipulate that either shall have the right to refer in his briefs and oral arguments to any portions of the records in these causes as filed in this Court on petition for certiorari which are not contained in the record as printed pursuant to this stipulation.

Dated at Washington, D. C., this 14 day of November, 1933.

Claude R. Branch, Robert A. Littleton, Attorneys for the Petitioners. J. Crawford Biggs, Solicitor General.

Endorsed on cover: File Nos. 37,748, 37,749, 37,750, 37,751, 37,752, 37,753. District of Columbia Court of Appeals. Term No. 145. Louise A. Whitcomb, petitioner, vs. David Burnet, Commissioner of Internal Revenue. Petion for writ of certiorari and exhibit thereto. Filed June 9, 1933. 145, O. T., 1933; 146, O. T., 1933; 147, O. T., 1933; 148, O. T., 1933; 149, O. T., 1933; 150, O. T., 1933.